NO. 15-60856

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CITIGROUP TECHNOLOGY, INCORPORATED; CITICORP BANKING CORPORATION (parent), a subsidiary of CITIGROUP, INCORPORATED,
Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, 12-CA-130742

BRIEF OF PETITIONERS/CROSS-RESPONDENTS CITIGROUP TECHNOLOGY, INCORPORATED; CITICORP BANKING CORPORATION (parent), a subsidiary of CITIGROUP, INCORPORATED

Edward M. Cherof (cherofe@jacksonlewis.com)
Jeffrey A. Schwartz (jake.schwartz@jacksonlewis.com)
Jonathan J. Spitz (spitzj@jacksonlewis.com)
Daniel D. Schudroff (schudroffd@jacksonlewis.com)

Jackson Lewis P.C.
1155 Peachtree Street, Suite 1000
Atlanta, GA 30309
(404) 525-8200

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1, the undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. Andrea Smith – Charging Party
2. Andrew Frisch, Esq. – Counsel for Charging Party
3. Caroline Leonard, Esq. – Counsel for Respondent/Cross-Petitioner
4. Christopher Zerby, Esq. – Counsel for Respondent/Cross-Petitioner
5. Citigroup, Inc. – Parent corporation of Petitioners/Cross-Respondents
6. Citicorp Banking Corporation – Petitioner/Cross-Respondent
7. Citigroup Technology, Inc. – Petitioner/Cross-Respondent
8. Daniel D. Schudroff, Esq. – Counsel for Petitioners/Cross-Respondents
9. Donna N. Dawson – Administrative Law Judge
10. Edward M. Cherof, Esq. – Counsel for Petitioners/Cross-Respondents
11. Elizabeth Ann Heaney - Counsel for Respondent/Cross-Petitioner

12. Jackson Lewis P.C. – Counsel for Petitioners/Cross-Respondents

13. Jeffrey A. Schwartz, Esq. – Counsel for Petitioners/Cross-Respondents

14. Jonathan J. Spitz, Esq. – Counsel for Petitioners/Cross-Respondents

15. Kent Y. Hirozawa – Member of Respondent/Cross-Petitioner

16. Lauren McFarren – Member of Respondent/Cross-Petitioner

17. Linda Dreeben - Counsel for Respondent/Cross-Petitioner

18. M. Kathleen McKinney - Counsel for Respondent/Cross-Petitioner

19. Margaret J. Diaz – Regional Director for Respondent/Cross-Petitioner

20. Morgan & Morgan – Counsel for Charging Party

21. National Labor Relations Board – Respondent/Cross-Petitioner

22. Philip A. Miscimarra – Member of Respondent/Cross-Petitioner

23. Stephanie L. Adler-Paindiris – Counsel for Petitioners/Cross-Respondents

24. Valerie Collins - Counsel for Respondent/Cross-Petitioner.

Respectfully submitted,

By: */s/ Edward M. Cherof*
Georgia Bar No. 123390

STATEMENT REGARDING ORAL ARGUMENT

Petitioners/Cross-Respondents Citigroup Technology, Inc. and Citicorp Banking Corp. (Parent), a subsidiary of Citigroup, Inc. (collectively "Citigroup") respectfully submit that oral argument is not necessary. The core issues in this case have already been decided by this Court in *D.R. Horton Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), petition for rehearing *en banc* denied (5th Cir. No. 12-60031, Apr. 16, 2014) and *Murphy Oil USA v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for rehearing *en banc* denied (5th Cir. No. 14-60800, May 13, 2015), petition for writ of certiorari filed September 9, 2016.

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

III. STATEMENT OF JURISDICTION

This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act ("NLRA" or "the Act") because the December 1, 2015 "Decision and Order" of Respondent National Labor Relations Board ("NLRB" or Board") is a final order. 29 U.S.C. § 160(f). Petitioners/Cross-Respondents are parties aggrieved by that Decision and Order. Citigroup Technology, Inc. transacts business within this judicial circuit, as defined in 28 U.S.C. § 41, by, among other things, operating a service center in Texas. Citicorp Banking Corp. (Parent), a subsidiary of Citigroup, Inc. transacts business within this judicial circuit, as defined in 28 U.S.C. § 41, by offering banking and other financial services in offices in Texas.

IV. STATEMENT OF THE ISSUES

1. Whether the Board majority erred by issuing a Decision and Order contrary to the Federal Arbitration Act ("FAA") as well as binding precedent interpreting the FAA from the United States Supreme Court and this Court?
2. Whether the Board's Decision and Order is supported by substantial evidence that Citigroup violated the Act?

V. STATEMENT OF THE CASE

A. BACKGROUND

The facts of this case are not in dispute. Citigroup employs approximately 1,000 employees at its place of business located at 3800 Citibank Center in Tampa, Florida, and thousands of other employees throughout the United States. (ROA.2).

Since on or about December 26, 2012, and continuing to the present, Citigroup has maintained and enforced as part of its U.S. Employee Handbook, "Appendix A: The Employment Arbitration Policy" revised (hereinafter "EAP" or "Policy"), with respect to all of its employees in the United States, including all employees employed at its Tampa, Florida facility. (ROA.2; 49-54). Since on or about December 26, 2012, and continuing to the present, Citigroup has required all newly hired employees to agree to the EAP as a condition of employment. (ROA.2).

On January 31, 2013, Citigroup offered Andrea Smith (hereinafter "Smith") the position of Anti-Money Laundering Operations Analyst in Citigroup's Tampa, Florida facility, which included as a part thereof a provision titled "Principles of Employment," an agreement to arbitrate pursuant to the EAP (hereinafter "job offer")(ROA.2). On February 5, 2013, Smith accepted Citigroup's job offer and electronically acknowledged receiving Citigroup's U.S. 2013 Employee Handbook the same day. (ROA.2; 56-64; 66).

Smith began working for Citigroup as an Anti-Money Laundering Operations Analyst on or about February 19, 2013, and she continued in that position until March 28, 2014, when she voluntarily resigned her employment with Citigroup. (ROA.3).

Meanwhile, in January, 2013, Darlene Echevarria (hereinafter "Echevarria") was hired by Citigroup as an Anti-Money Laundering Operations Analyst in Citigroup's Tampa, Florida facility. (ROA.2). Before Echevarria commenced employment, on December 27, 2012, she electronically signed the EAP. (ROA.4, 94-95). Echevarria worked for Citigroup in that position from January 7, 2013, until August 23, 2013. (ROA.2).

B. THE EMPLOYMENT ARBITRATION POLICY

Smith also electronically signed Citigroup's EAP on February 5, 2013. (ROA.3; 68-73). As pertinent in the present case, the EAP states:

> The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963,

> the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining Notification Act, the Sarbanes-Oxley Act of 2002, and the amendments thereto, and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.
>
> Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently[,] neither Citi nor any employee may submit a class action, collective action, or other representation action for resolution under this Policy.

(ROA.68-69).

C. PROCEEDINGS BEFORE THE AAA

On March 28, 2014, Echevarria, on her own behalf and on behalf of other similarly situated employees of Citigroup, including Smith, Danielle Lucas, Yadira Calderon and Kelleigh S. Weeks, through counsel, submitted a demand for arbitration to the American Arbitration Association (hereinafter referred to as "AAA"), titled "Nationwide Class Action Arbitration Submission," a "Notice of Filing Notice of Consent to Join" and "Notices of Consent to Join Collective Action" signed by Darlene Echevarria, Danielle Lucas, Yadira Calderon, Kelleigh Weeks, and Andrea Smith, seeking designation of the action in Darlene Echevarria, on her own behalf and others similarly situated v. Citigroup, Inc., a Foreign Profit Corporation and Citibank, N.A. as a collective action. (ROA.3; 75-90). The allegations in the demand asserted that Citigroup violated the Fair Labor Standards

Act, 29 U.S.C. § 201, *et seq.*, by failing to pay overtime wages to Echevarria and other similarly situated employees of Citigroup, including Smith, Danielle Lucas, Yadira Calderon and Kelleigh S. Weeks, and seeking certain compensation, damages and other relief. (ROA.3; 75-90).

On April 14, 2014, AAA Case Filing Coordinator Kristen Cottone sent a letter to the parties in the matter of Darlene Echevarria v. Citigroup. Inc., et al., Case No. 01-14-0000-0324, requesting a full copy of the arbitration agreement between the parties and other information, so AAA could decide whether it could proceed with the case. (ROA.3-4; 92).

On April 15, 2014, Counsel for Citigroup sent a letter to AAA, accompanied by the EAP, requesting that AAA reject Echevarria's demand for designation of her claim as a nationwide collective arbitration and only accept her individual claim. (ROA.4; 94-95).

On April 28, 2014, Ms. Cottone sent a letter to all parties in the matter of Darlene Echevarria v. Citigroup, Inc., et al., Case No. 01-14-0000-0324, stating that in accordance with AAA's policy on class arbitrations, it could not administer the matter as a class action, since the agreement between the parties (the EAP) prohibits class actions. (ROA.4; 97).

D. PROCEEDINGS BEFORE THE NLRB

On June 12, 2014, Smith filed an unfair labor practice charge with the Board's Region 12 against Citigroup (which she subsequently amended on August 27, 2014). (ROA.42; 47). On August 29, 2014, the Region issued a complaint against Citigroup (which it amended on September 10, 2014) asserting Citigroup violated Section 8(a)(1) of the National Labor Relations Act by "maintaining and enforcing a mandatory employment arbitration policy precluding its employees from pursuing any group, class, or collective actions, arbitration or otherwise, concerning wages, hours and other terms and conditions of employment." (ROA.31-39; 19-30).

On October 8, 2014, the parties filed a joint motion with Administrative Law Judge Donna Dawson requesting that the matter be adjudicated on a stipulated record. (ROA.1-97). On October 9, 2014, Judge Dawson granted the motion. (ROA.98). After the parties submitted briefs addressing the matters at issue, on December 23, 2014, Judge Dawson issued her decision finding Citigroup's maintenance and enforcement of the EAP violated the Act. (ROA.149-164). Citigroup timely filed exceptions to Judge Dawson's decision. (ROA.173-179).

On December 1, 2015, the Board issued its decision in *Citigroup Technology, Inc.* 363 NLRB No. 55 (2015) (hereinafter "*Citigroup*") holding that the EAP violated Section 8(a)(1) of the Act. (ROA.218-228). A bare majority over a vigorous dissent reaffirmed the Board's erroneous decisions in *D.R. Horton*, 357 NLRB No.

184 (2012) and *Murphy Oil USA*, 361 NLRB No. 72 (2014)(hereinafter *"Murphy Oil"*). This Court denied enforcement of these cases in December 2013 and October 2015, and expressly rejected all theories pursued by the Board in the instant case. Citigroup petitions this Court to review the Board's order finding that its arbitration agreement violates the NLRA.[1]

VI. SUMMARY OF THE ARGUMENT

In *D.R. Horton Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil, USA v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for rehearing *en banc* denied (5th Cir. No. 14-60800, May 13, 2015), petition for writ of certiorari filed September 9, 2016, this Court found that the Board erroneously held that an employer violates the NLRA by requiring employees to sign an arbitration agreement containing collective/class action waivers. Relying upon controlling United States Supreme Court precedent, this Court explained that the Board's decision failed to afford proper deference to the policies favoring arbitration pursuant to the FAA. In defiance of this Court's clear directive in both of these cases, the Board has issued decisions reaffirming the erroneous legal conclusions that the Board reached in *D.R. Horton* and *Murphy Oil, USA.*

[1] On July 27, 2016, the Board filed its Cross-Application for Enforcement. For the reasons stated herein, that relief should be denied in its entirety.

Contrary to the Board's erroneous Decision and Order in the instant case, the EAP does not violate the Act. Through this Petition for Review, Citigroup is not asking this Court to address a typical unfair labor practice case that can be decided in a vacuum of Board precedent. Rather, Citigroup asks that this Court continue to apply its own precedent, which is binding on the Board here, on issues which Congress has chosen to regulate through another statute, namely, the FAA. Four recent decisions of the United States Supreme Court have established the broad preemptive sweep of the FAA. These decisions by the High Court mandate that arbitration agreements be enforced according to their terms, and they reject the application of other state and federal statutes to arbitration agreements in the absence of an express "congressional command" to override the FAA. Additionally, contrary to the Board's erroneous conclusions, the contractual defenses enumerated in the FAA's saving clause are inapplicable to the instant matter and cannot be used to validate the Board's erroneous position in *Citigroup*.

In addition, the Board erred in failing to find this matter to be untimely, as it was clearly filed outside the six-month statute of limitations established by Section 10(b) of the Act. Additionally, the Board erred in concluding Smith was engaged in protected concerted activity when she joined the demand for arbitration in the instant case.

For these reasons and those set forth below, Citigroup urges the Court to follow its decisions in *D.R. Horton* and *Murphy Oil* and to recognize the validity of Member Miscimarra's dissenting opinion in the present case by granting Citigroup's Petition for Review and denying the Board's Cross-Application for Enforcement.

VII. ARGUMENT

I. STANDARD OF REVIEW

The Fifth Circuit will enforce the Board's decision "if it is reasonable and supported by substantial evidence on the record considered as a whole." *Murphy Oil*, 808 F.3d at 1016; *D.R. Horton*, 737 F.3d at 349 (5th Cir. 2013) *citing Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007); *see also* 29 U.S.C. § 160 (e). As this Court has noted, "[i]n light of the Board's expertise in labor law, 'we will defer to plausible inferences it draws from the evidence, even if we might reach a contrary result were we deciding the case *de novo*.' *D.R. Horton*, 737 F.3d at 349 (internal citations omitted). The Court's deference is applicable to the Board's "findings of facts and its application of the law." *Id.* (internal citations omitted). Finally, "[w]hile the Board's legal conclusions are reviewed *de novo*, *Strand*, 493 F.3d at 518, its interpretation of the NLRA will be upheld 'so long as it is rational and consistent with the Act.'" *Id*. (internal citations omitted).

Despite any deference generally accorded to the Board's decision, given this Court's recent decisions in *D.R. Horton* and *Murphy Oil*, which decided the core

issues underlying the instant appeal, and "[a]bsent a clear contrary statement from the Supreme Court or en banc reconsideration, [this Court is] bound by [its] own precedent." *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 394 (5th Cir. 2014).

II. THE BOARD ERRED IN REFUSING TO FOLLOW SUPREME COURT PRECEDENT INTERPRETING THE FAA AND MANDATING THAT ARBITRATION AGREEMENTS BE ENFORCED ACCORDING TO THEIR TERMS.

A. The Validity of Citigroup's EAP and the Class/Collective Action Waiver Contained in the EAP Must Be Determined Under the FAA and Not Under *D.R. Horton, Murphy Oil* or the NLRA.

In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), which was issued after the Board's decision in *D.R. Horton*, the Supreme Court held that a class/collective action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. *Id.* at 2309; *see also CompuCredit v. Greenwood*, 132 S. Ct. 665, 669 (2012) (also issued after the Board's decision in *D.R. Horton)*.

Under *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), *CompuCredit*, *Marmet Health Care Ctr. v. Brown*, 133 S. Ct. 1201 (2012), and *American Express*, the validity of Citigroup's EAP and class/collective action waiver contained therein must be determined under the FAA, not under the Board's decisions in *D.R. Horton*, *Murphy Oil* or the NLRA. Rather, in construing the broad reach and preemptive effective of the FAA the Supreme Court has held:

- The FAA reflects an "emphatic policy in favor" of arbitration. Enacted in 1925, the FAA places arbitration agreements on the same footing as other contracts and declares that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law for the revocation of any contract." 9 U.S.C. § 2. The FAA "reflects an emphatic federal policy in favor" of arbitration. *KPMG, LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011)(internal citations omitted). As the Supreme Court has emphasized, arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 23, n. 27 (1983), and are to be "rigorously enforced," *Perry v. Thomas*, 482 U.S. 483, 490 (1987)(internal citations omitted).
- Arbitration agreements, including those containing class/collective action waivers, are enforceable in accordance with their terms. "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)(internal citations omitted). As such, courts are primarily charged with the responsibility to enforce arbitration agreements in accordance with their terms so as to give effect to the bargain of the parties. *See, e.g., CompuCredit*, 132 S. Ct. at 669 (The FAA "requires

courts to enforce agreements to arbitrate according to their terms"); *Marmet*, 133 S. Ct. at 1203 (internal citations omitted) (The FAA "'requires courts to enforce the bargain of the parties to arbitrate'"). As arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (The parties to an arbitration "may agree to limit the issues they choose to arbitrate," "may agree on [the] rules under which any arbitration will proceed," and "may specify *with whom* they choose to arbitrate their disputes")(internal citations omitted). Indeed, as the Supreme Court recently observed when holding that a state law requiring parties to submit to class arbitration was preempted by the FAA: a state law requiring parties, in contravention of their arbitration agreement, to "shift from bilateral arbitration to class-action arbitration" results in a "fundamental" change to their bargain and is "inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748-1751 (internal citations omitted).

- Arbitration agreements involving federal statutory rights, including those containing class/collective action waivers, are enforceable "unless Congress itself has evinced an intention," when enacting the statute, to "override" the FAA mandate by a clear "contrary

congressional command." *Mitsubishi v. Soler Chrysler*, 473 U.S. 614, 627 (1985) (internal citations omitted); *American Express,* 133 S. Ct. at 2309. The Supreme Court has consistently held that parties may agree to arbitrate claims arising under federal statutes. *See, e.g.*, *Mitsubishi*, *supra*, 473 U.S. at 627. As long as the arbitral forum affords the parties the opportunity to vindicate any statutory rights forming the basis of their claims, the parties will be held to their bargain to arbitrate. *CompuCredit*, 132 S. Ct. at 671 ("So long as the *guarantee* [of a federal statute's civil liability provision]—*the guarantee of the legal power to impose liability*—is preserved," the parties remain free to enter into an agreement requiring the arbitration of their statutory rights). However, if, when enacting a federal statute, "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," then such statutory rights cannot be subjected to arbitration and the FAA's mandate to enforce arbitration agreements according to their terms is thereby overridden by a contrary congressional command. *Mitsubishi*, 473 U.S. at 628; *American Express*, 133 S. Ct. at 2309. "If Congress did intend to limit or prohibit [the] waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history'" or

"from an inherent conflict between arbitration and the statute's underlying purpose." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), quoting *Mitsubishi*, 473 U.S. at 627, 632-637. However, any expression of congressional intent in this regard must be clear and unequivocal. *See, e.g.*, *CompuCredit*, 132 S. Ct. at 673 (If a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms").

- Employment arbitration agreements fall within the ambit of the FAA and are enforceable on the same terms as other arbitration agreements. The FAA encompasses employment arbitration agreements, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001), including those containing class/collective action waivers. As the Supreme Court affirmed in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991), where it enforced an arbitration agreement involving a claim arising under the Age Discrimination in Employment Act, the FAA requires such a result even if there may be "unequal bargaining power between employers and employees" and even if "the arbitration could not go forward as a class action." As to this latter point, the Supreme Court in *Gilmer* implicitly recognized that a class action, as set forth in

> the Federal Rules of Civil Procedure, is simply a procedural device which, as the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, cannot "abridge, enlarge or modify any substantive right"—and can be, like the choice of a judicial forum, waived.

As these principles attest, the FAA recognizes the rights of parties, whether they are employers or employees, to enter into arbitration agreements, including the right to fashion the procedures under which an arbitration is to proceed. The FAA further mandates that arbitration agreements be enforced according to their terms unless there is a clear congressional command to the contrary. Indeed, as discussed below, there is nothing in the NLRA itself or its legislative history that would even suggest that Congress sought to "override" the FAA's mandate and preclude an employee from waiving his or her procedural right to file a class/collective action when agreeing to arbitrate employment-related claims. Accordingly, by failing to follow this controlling precedent, the Board erred in finding the EAP in the instant case to be unlawful.

B. Following Supreme Court Precedent, This Court Correctly Set Aside the Board's *D.R. Horton* and *Murphy Oil* Decisions and Orders.

As noted herein, this issue has previously presented itself to this Court. On December 3, 2013, the United States Circuit Court of Appeals for the Fifth Circuit granted the petition for review filed by D.R. Horton, Incorporated and ultimately set aside the Board's decision invalidating the company's arbitration agreement. *D.R.*

Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013), *pet. for rehearing en banc denied* (5th Cir. No. 12-60031, Apr. 16, 2014). This Court held that "the Board's decision did not give proper weight to the [FAA]." *Id.* at 348. In a detailed opinion, the court examined the Board's *D.R. Horton* decision in light of applicable Supreme Court precedent and rejected all of the Board's arguments.

First, this Court ruled that the right to participate in a class or collective action is not a substantive right, but rather, is a "procedural device." *Id.* at 357. This Court also held that the Board could not rely on the FAA's "saving clause" to justify its invalidation of arbitration agreements.[2] On this point, this Court explained that "[r]equiring the availability of class actions 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* (internal citations omitted). This Court also determined that the Board's prohibition of class action waivers disfavors arbitration, as it ruled that "[w]hile the Board's interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration." *Id.* at 360. Therefore, this Court ruled that "[a] detailed

[2] The FAA's saving clause provides, in pertinent part: "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, *save upon such grounds as* exist *at law or in equity for the revocation of any contract.*" *Id.* citing 9 U.S.C. § 2. (emphasis added). This Court noted that the Board incorrectly found D.R. Horton's arbitration agreement "violated the collective action provisions of the NLRA, making the saving clause applicable." *Id.* at 359.

analysis of *Concepcion* leads to the conclusion that the Board's rule does not fit within the FAA's saving clause." *Id.* at 359.

Next, this Court concluded that the NLRA does not contain a congressional command to override the FAA. Relying on *Gilmer*, this Court stated: "When considering whether a contrary congressional command is present, courts must remember 'that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Id.* (internal citations omitted). This Court explicitly ruled that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* Moreover, this Court found that neither the legislative history of the NLRA, nor any policy consideration, would permit the NLRA to override the FAA. *Id.* at 361.

This Court also noted that it was of some importance that "the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice." *Id.* at 362 (internal citations omitted). Thus, this Court reached the conclusion that "[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA," noting that "[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer

to the NLRB's rationale, and held arbitration agreements containing class action waivers enforceable." *Id.*[3]

This Court's October 26, 2015 decision in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for rehearing *en banc* denied (5th Cir. No. 14-60800, May 13, 2015), petition for writ of certiorari filed September 9, 2016, did not rehash the substantive reasons for granting the respondent's petition for review. Instead, this Court held:

> [o]ur decision in [D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 348 (5th Cir. 2013)] was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.

Id. at 1018.

---

[3] *See Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) *cert denied* 134 S. Ct. 2886 (June 30, 2014) (citing this Court's decision with approval "that the National Labor Relations Act does not contain a contrary congressional command overriding the application of the FAA"); *Owen v. Bristol Care, Inc.* 702 F.3d 1050, 10533-55 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013). *See also Raniere v. Citigroup*, 533 Fed. Appx. 11 (2d Cir. 2013).

It should also be noted that the United States Court of Appeals for the Eighth Circuit has reached the same outcome as this Court. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016). Citigroup recognizes that since *D.R. Horton* and *Murphy Oil* were issued, the United States Courts of Appeals for the Seventh and Ninth Circuits reached opposite conclusions from this Court. *See e.g. Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young*, 13-16599, 2016 U.S. App. LEXIS 15638 (9th Cir. Aug. 22, 2016). However, these cases are, of course, not binding on this Court. Citigroup acknowledges that both aggrieved respondents in these cases have filed petitions for writs of certiorari with the United States Supreme Court.

Further, in *Chesapeake Energy Corp. v. NLRB*, 15-60326, 2016 U.S. App. LEXIS 2492 (5th Cir. Feb. 12, 2016), this Court similarly rejected the Board's non-acquiescence with its earlier decisions in *D.R. Horton* and *Murphy Oil*. Specifically, this Court ruled because "[t]his court's rule of orderliness prevents one panel from overruling the decision of a prior panel,' we simply note that no intervening change in the law permits reconsideration of our precedent." Id. at *4. *See also Citi Trends, Inc. v. NLRB*, 15-60913, 2016 U.S. App. LEXIS 14683 (5th Cir. Aug. 10, 2016); *PJ Cheese, Inc. v. NLRB*, 15-60610, 2016 U.S. App LEXIS 12889 (5th Cir. June 16, 2016).

This logic applies equally to the present case. For the reasons described below, this Court's decisions in *D.R. Horton* and *Murphy Oil* are dispositive in the instant case. Accordingly, the Board erred by failing to follow this Court's decisions.[4]

[4] As discussed *infra*, the Board's non-acquiescence to this Court's decision in *D.R. Horton* is improper.

III. THE BOARD ERRED BY FOLLOWING ITS *MURPHY OIL* DECISION, WHICH IMPROPERLY VALIDATED THE BOARD'S ERRONEOUS DECISION IN *D.R. HORTON*.

As discussed in detail below, the Board erred by following the untenable holdings set forth by its own *Murphy Oil* and *D.R. Horton* decisions, both of which have been denied enforcement by this Court.[5]

A. The *Murphy Oil* Majority's Attempt To Challenge This Court's Decision In *D.R. Horton* Was Unavailing.

In the present case, the Board essentially adopted the majority's findings in *Murphy Oil*. However, in light of this Court's decision in *D.R. Horton* (and later in

---

[5] The Board did correctly reverse the Administrative Law Judge's finding that Citigroup violated the Act by "enforcing the EAP because, after the demand for class arbitration was filed with the AAA, [Citigroup] called to the AAA's attention the fact that the arbitration agreement did not provide for class treatment of arbitration demands." (ROA.218). Instead, the Board properly held that "[b]ased on the fact that the former employee initiated the arbitration proceeding, and considering the provisions and policies of the Federal Arbitration Act, we find, contrary to the judge, that [Citigroup's] conduct did not amount to enforcement of the EAP in violation of Section 8(a)(1)." (ROA.218).

At the same time, the Board majority found that "[i]f the former employee's claims had been brought in court as a collective action, and [Citigroup] had moved to dismiss based on the EAP, we would have found that [Citigroup] violated Sec. 8(a)(1) by enforcing the unlawful policy." (ROA. 218). The Board majority's viewpoint is in direct contrast to this Court's decision in *Murphy Oil* which held:

> Murphy Oil had at least a colorable argument that the Arbitration Agreement was valid when its defensive motion was made, as its response to the lawsuit was not 'lack[ing] a reasonable basis in fact or law,' and was not filed with an illegal objective under federal law. *See Bill Johnson's*, 461 U.S. at 737 n.5, 744, 748. Murphy Oil's motion to dismiss and compel arbitration did not constitute an unfair labor practice because it was not 'baseless.'

808 F.3d at 1021. *See also* member Miscimarra's dissent in *Citigroup*.

Murphy Oil and *Chesapeake Bay*), the *Murphy Oil* majority opinion provides no support for the Board's incorrect position that *D.R. Horton* was correctly decided. The Board's *Murphy Oil* majority insisted that the Board's decision in *D.R. Horton* did not conflict with the FAA because: (1) such a conclusion places an arbitration agreement on equal footing with other private contracts that conflict with federal law; (2) Section 7 rights are substantive, not procedural in nature; (3) the FAA does not explicitly establish that an arbitration agreement violative of the NLRA can be construed as enforceable but the FAA's saving clause does state that a conflict with federal law can be grounds for invalidating an agreement; and (4) even presuming a direct conflict between the NLRA and FAA, the Norris-LaGuardia Act ("NLGA") mandates that the FAA yield to the NLRA. 361 NLRB No. 72, slip op. at 6.

For the reasons discussed below, because the *Murphy Oil* majority panel was wrong on all of these accounts, the Board in the present case erred by relying upon its earlier decisions in *D.R. Horton* and *Murphy Oil*.

1. The *Murphy Oil* Majority Ignored That The NLRA Does Not Protect or Restrict Non-NLRA Procedures Regarding How Other Courts or Other Agencies Will Adjudicate Non-NLRA Legal Claims.

As noted above, the *Murphy Oil* majority panel ignored that the Board has no authority to interpret the FAA or the NLGA, much less to make judgment calls as to which statutes prevail when there is an arguable conflict. Rather, this type of analysis is reserved for federal appellate courts, footnote 17 of the Board's decision

notwithstanding. ("The Board is not required to acquiesce in adverse decisions of the Federal Courts in subsequent proceedings not involving the same parties."). *Id.* at slip op. 2.

In his dissent in *Murphy Oil*, Member Miscimarra eloquently pointed out that:

> nothing reasonably supports a conclusion that Congress, in the NLRA, vested the Board with authority to dictate or guarantee how *other* courts or *other* agencies would adjudicate non NLRA legal claims, whether as "class actions," "collective actions," the "joinder" of individual claims, or otherwise. Rather, Congress clearly contemplated that such procedural details would be adjudicated in accordance with procedures prescribed in non-NLRA statutes, supplemented by procedural rules authorized or adopted by Congress, State legislatures, and the courts and agencies charged with enforcing non-NLRA claims. Because the NLRA does not dictate or prescribe any particular procedures governing non-NLRA claim adjudications, I believe the Board lacks authority to conclude that "class" waivers constitute unlawful restraint, coercion, or interference in violation of Section 8(a)(1).[6]

Id. at slip op. 23 (internal citations and footnotes omitted).

Member Miscimarra also correctly explained in *Murphy Oil* that:

> ... it defies reason to suggest that Congress, in 1935, incorporated into the NLRA a guarantee that non-NLRA claims will be afforded "class" treatment when there was no uniformity then—nor is there now—

[6] Member Miscimarra echoed this conclusion in his dissenting opinion in the present case. (ROA.218-220). Member Miscimarra's dissent in both *Murphy Oil* and the instant case also referenced how Section 9(a) of the Act "protects the right of every employee as an 'individual' to 'present' and 'adjust' grievances 'at any time…' which is "reinforced by Section 7 of the Act, which protects each employee's right to 'refrain from' exercising the collective rights enumerated in Section 7." (ROA.219). Based upon the interaction of these two provisions, Member Miscimarra correctly found "it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims; (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements; and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act…." (ROA.219) (internal footnotes omitted).

> regarding what "class" treatment even means. The majority cites *D. R. Horton,* supra, for the proposition that Section 7 confers a "right to litigate ... employment-related claims concertedly on a *joint, class,* or *collective basis*" (emphasis added), but these terms have very different meanings. In *D. R. Horton*, the Board conceded: "Depending on the applicable class or collective action procedures, of course, a *collective* claim or *class action* may be filed in the name of *multiple employee-plaintiffs* or a *single employee-plaintiff*, with other class *members sometimes being required to opt in or having the right to opt out of the class later*." 357 NLRB No. 184, slip op. at 3 (emphasis added and in original).

Id. at slip op. 26.

Member Miscimarra illustrated the lack of legislative intent which would have been necessary for the *Murphy Oil* majority panel's conclusions to be valid:

> When enacting the NLRA in 1935, if Congress had intended to guarantee the availability of one or more of the above procedures regarding litigation of employees' *non*-NLRA claims, one would reasonably expect this intent to be reflected in the Act or its legislative history. One would also expect there to be guidance as to which class-type procedures, regarding what stages, of non-NLRA litigation are guaranteed. However, the Act and its legislative history are completely silent as to these issues. Section 8(a)(1) and (b)(1)(A) merely prohibit restraint and coercion regarding "rights guaranteed in section 7." And Section 7 confers protection triggered by "concerted" activity for the "purpose" of "mutual aid or protection," which…may arise from non-NLRA claims and complaints *regardless of whether or not class-type procedures are applicable*.

Id. at slip op. 27 (Emphasis in original).

As a result, Member Miscimarra correctly explained that:

> ... if Section 7 guaranteed class-type procedures relating to claims brought under *non*-NLRA statutes, this would produce an array of incongruities that could not reasonably have been intended by Congress. The NLRA was designed to create a "single, uniform,

> national rule" displacing the "variegated laws of the several States," producing the "uniform application of its substantive rules and . . . avoid[ing] . . . diversities and conflicts likely to result from a variety of local procedures and attitudes." By comparison, as noted above, there is a near-endless variety of class-type procedures, their potential availability varies depending on the type of claim and the forum in which it is adjudicated, and extensive proceedings are necessary to determine whether class-type treatment is even appropriate in a given case. Such inherent uncertainty and variation regarding class-type treatment—if incorporated into the NLRA—would *preclude* any "single, uniform, national rule." Similarly, the existence or absence of class-type "protection" would necessarily involve "diversities and conflicts" of a type of that Congress adopted the Act to prevent.… The Board has no special competence regarding class-type procedures, and our determinations in this area almost certainly would not be afforded deference.

Id. at slip op. 28 (Emphasis in original, internal citations and footnotes omitted).

The majority panel in *Murphy Oil* disregarded the flaws illustrated by the dissenters and improperly concluded that the underlying agreements in that case, which, like the present case, contain class/collection action waivers, violated the Act. Simply stated, Congress authorized the Board to enforce the Act, not other federal and state statutes. That is precisely why the Board's decisions in *Murphy Oil*, *D.R. Horton,* and now the instant case are so overreaching and cannot remain valid.

2. The *Murphy Oil* Majority Failed To Properly Reconcile The NLRA With The FAA.

The Board majority in *Murphy Oil* also accused this Court of failing to reconcile the NLRA with the FAA by "view[ing] the National Labor Relations Act and its policies much more narrowly than the Supreme Court has, while treating the

Federal Arbitration Act and its policies as sweeping far more broadly than that statute or the Supreme Court's decisions warrant." *Id.* at slip op. 7. This unsupported contention qualifies as a clear double standard. The Board in *Murphy Oil* never explained why the FAA would need to yield to the NLRA under these circumstances. Instead, in wholly *ipse dixit* fashion, the Board majority simply declared that the NLRA trumps even though it has no authority whatsoever to interpret, much less enforce, the FAA.

Moreover, the Board majority in *Murphy Oil* asserted that "[t]he costs to Federal labor policy imposed by [this Court's] decision would be very high…[because] [t]he substantive right at the core of the NLRA would be severely compromised, effectively forcing workers into economically disruptive forms of concerted activity and threatening the sort of 'industrial strife' that Congress recognized as harmful." *Id*. However, this doomsday scenario is entirely speculative and contrary to Supreme Court and appellate court precedent. Specifically, if arbitration agreements of this sort presented such dire situations for American workers as the Board majority in *Murphy Oil* urged, this issue certainly would have arisen and been adjudicated by the Board well before *D.R. Horton* in 2012. Moreover, it fails to address why aggrieved individuals simply would not choose to redress their grievances individually.

By contrast, Member Johnson's dissent in *Murphy Oil* correctly pointed out that there must be a balance between Section 7 rights and employer interests and that the majority seemingly shirked its responsibility to evaluate these interests:

> The majority disagrees that the Section-7-neutral interest of avoiding unwarranted aggregate liability is a proper subject for Board consideration. The majority's view appears to be that it is Congress' or the courts' job to deal with whatever problems this might pose, not ours. But the Board has the statutory duty and functional responsibility to take account of employer interests in any Section 7 balancing that it performs. What's more, both Congress and the Supreme Court have already told us via the FAA and its associated jurisprudence that there is nothing wrong with a party's desire to avoid class litigation or class arbitration. Here, the Board is simply not doing its job, while also ignoring legislative and judicial recognition of the employer interest at stake.

Id. at slip op. 47. (Internal citations and footnotes omitted).

Although the majority panel in *Murphy Oil*, which the Board and administrative law judge followed in *Citigroup*, stated that no Supreme Court precedent is directly applicable to the consideration of the issues underlying the instant case, this is not dispositive. The salient issue is whether the majority's position could co-exist with the Supreme Court's FAA jurisprudence. As described above, it cannot. Further, undeterred by this Court's decision in *Murphy Oil*, the Board has subsequently issued cases, including the instant one, which explicitly defy this Court's clear reasoning that class/collective action waivers are not unlawful.

This Court should compel the Board to harmonize its interests with those of other competing and higher authorities such as the Circuit Courts and Supreme

Court. Therefore, the Court should grant Citigroup's Petition for Review and deny enforcement of the Board's Decision and Order here.

3. The Joint Pursuit Of Legal Claims Is Not A Substantive Right Under Section 7.

The Board majority in *Murphy Oil* next erroneously concluded that this Court was incorrect when it held that "the pursuit of legal claims concertedly is *not* a substantive right under Section 7 of the NLRA." *Id*. at slip op. 7. (Emphasis in original). Instead, according to the Board majority, its decision in *D.R. Horton* was correct in finding that the "right to engage in collective action – including collective *legal* action – is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Id.* (Emphasis in original, internal citations omitted). The Board majority then attempted to contrast other federal workplace statutes, such as the Fair Labor Standards Act and Age Discrimination in Employment Act, on the ground that they "provide additional legal rights and remedies in the workplace, but in no way supplant, or serve as a substitute for, workers' basic right under Section 7 to engage in concerted activity as a means to secure whatever workplace rights the law provides them." *Id.* at slip op. 8. According to the Board majority, "while the underlying legal claims involved the FLSA, it is the NLRA that is the source of the relevant, substantive right to pursue those claims concertedly." *Id.*

Again, in what seems to be a central theme in its decisions in *D.R. Horton* and *Murphy Oil*, the Board majority provided no support for this contention. As dissenting Member Johnson aptly illustrated in *Murphy Oil*:

> [t]his error results in the tautology that such rights are Section 7 rights because they are 'substantive,' and thus Section 7 protects them as substantive rights. **The Board cannot make something that walks like, looks like, and sounds like a procedural duck into a substantive swan, merely by declaring that it falls into the ambit of Section 7.**

Id. at slip op. 51 (emphasis added).

Moreover, if, as the Board majority suggested in *Murphy Oil*, Section 7 created this substantive right, other federal workplace statutes such as the FLSA or ADEA would specifically incorporate Section 7 into their text, either explicitly or implicitly. The Board majority did not and cannot point to any legislative history of any workplace statute affording employees a *substantive* right to proceed collectively on these grounds.

The Board further ignores that for the NLRA to have any relevance in this regard, employees must first avail themselves of substantive rights afforded *under other statutes*. The following scenario is illustrative. A single employee may file an age discrimination claim under the Age Discrimination in Employment Act ("ADEA") without asserting any rights under the NLRA. Conversely, for a group of employees to assert NLRA rights in this scenario, they would also *necessarily* have to avail themselves of their rights under the ADEA. In other words, the NLRA

cannot have any sustenance without the ADEA or some other employment-related statute just as a procedural rule has no viability unless a substantive claim is asserted. That is precisely why the NLRA is nothing more than a procedural right which can be waived pursuant to well-established Supreme Court jurisprudence. *See e.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991); *D.R. Horton*, 737 F.3d 344, 359 (5th Cir. 2013). As a result, the NLRA is not "coequal" under these circumstances. Rather, it is a sidekick.

Therefore, an arbitration agreement containing a class or collective action waiver, like the present case, does not qualify as an improper prospective waiver of Section 7 rights. As a result, the Board's reliance in the instant case upon its erroneous holdings in *D.R. Horton* and *Murphy Oil* is misplaced.

4. <u>This Court Correctly Held That The FAA's Saving Clause Did Not Apply to Murphy Oil.</u>

The Board majority in *Murphy Oil* also found that the FAA's saving clause, which permits revocation "upon such grounds as exist at law or in equity for the revocation of any contract" applied. *Id.* at slip op. 9. However, as dissenting Member Johnson correctly illustrated in *Murphy Oil*:

> The Supreme Court has made clear that the FAA savings clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." But the Court has also made clear that the FAA savings clause does not permit defenses that, while neutral on their face, "would have

> a disproportionate impact on arbitration agreements." *And the Court has made equally clear that any provision requiring classwide litigation is just such a defense*.
>
> Requiring that classwide procedures always be available has an impermissible disproportionate impact on arbitration agreements, because in practice its prohibition falls more heavily on such agreements…. Nor does the alternative of classwide arbitration save the rule: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Either way, "employers would be discouraged from using individual arbitration." Accordingly, "the FAA requires not just compelling arbitration, but compelling arbitration on an individual basis in the absence of a clear agreement to proceed on a class basis.

Id. at slip op. 50. (Emphasis in original, internal citations and footnotes omitted).

The Board majority in *Murphy Oil* unpersuasively attempted to distinguish this Court's reliance on *Concepcion* on the ground that, unlike there, the issue was whether federal law preempted a state law barring class action waivers in consumer contracts. According to the Board majority, *D.R. Horton* has no connection to federal preemption, but rather, only a tie to balancing two federal statutory schemes, the FAA and NLRA. Although the Board stated that in *D.R. Horton*, it "explained, with care, why in the context of cases like this one, the NLRA and the FAA are 'capable of co-existence,'" no such explanation is apparent. *Id.* at slip op. 9. (Internal citations and footnotes omitted). Instead, to the Board majority, it truly is the NLRA or the highway with no inclination to harmonize with other competing interests. As a result,

the Board majority's decision was erroneous and it was improper for the Board in the instant case to follow *Murphy Oil* in this regard.

5. This Court Correctly Held That The NLRA Does Not Contain A Contrary Congressional Command To Override The FAA.

Given the Supreme Court's recent decisions in *Concepcion, CompuCredit, Marmet* and *American Express,* it cannot reasonably be argued that the Board's decisions in *D.R. Horton*, *Murphy Oil*, or *Citigroup* are supportable. The Board's attempt to reach a contrary result predicated upon its erroneous holdings in *D.R. Horton* and *Murphy Oil* is without merit. This is especially so in light of *American Express,* which held that arbitration agreements with class action waivers are enforceable under the FAA notwithstanding any policy arguments to the contrary. *American Express*, 133 S. Ct. at 2337. Rather, as noted by this Court in *D.R. Horton*, only a "contrary congressional command" in a particular statute can override the FAA's mandate that arbitration agreements be enforced according to their terms. 737 F.3d at 361. However, according to the Board majority in *Murphy Oil*, "[w]e see no compelling basis for [this Court's] conclusion that to override the FAA, Section 7 was required to explicitly provide for a private cause of action for employees, a right to file a collective legal action, and the procedures to be employed." *Murphy Oil*, 361 NLRB No. 72, at slip op. 9. To support this meritless argument, the Board majority relied upon Section 10(a) of the Act, which states that the Board "shall not be affected by any other means of adjustment or prevention that

has been or may be established by agreement, law, or otherwise." *Id.* at slip op. 8. Therefore, according to the Board majority, "[a]n arbitration agreement like the one here, even if it did not run afoul of the FAA's savings clause, would seem to be precisely the sort of 'means of adjustment . . . established by agreement' that *cannot* affect the Board's enforcement of Section 7." *Id.* at slip op. 9. (Emphasis in original).

The majority in *Murphy Oil* placed more emphasis on Section 10(a) than it can possibly bear. As dissenting Member Johnson held in *Murphy Oil*, there are several reasons that the Board majority's findings are erroneous. First, "the words or phrases 'class action,' 'class action waiver,' or 'arbitration agreement' nowhere appear or are combined with 'prohibit, 'limit,' void,' or any kind of express restrictions one would find necessary to override the FAA." *Id.* at slip op. 53. Further, "it is obvious that the relatively generic term 'concerted activity' cannot function as an express obliteration of class action waivers." *Id.* Simply stated, there is nothing in the text of the NLRA to "prohibit[] arbitration agreements under the reasoning of [*American Express*], a case which binds us on principles of statutory construction wherever conflict between the FAA and another statute may exist." *Id.* at slip op. 53-54. Moreover, the Board majority is precluded from referring to its precedent "interpreting Section 7 in the context of group litigation to 'bootstrap' its way into creating an 'express Congressional command' to set aside arbitration agreements." *Id.* at slip op. 54. Instead, as dissenting Member Johnson effectively

drove the point home, "[s]imply put, we are not Congress, and our case adjudications cannot create that command."[7] *Id*.

Accordingly, the Board improperly followed its incorrect holdings in *D.R. Horton* and *Murphy Oil* that a congressional command exists to override the FAA under these circumstances. This Court should therefore grant Citigroup's Petition for Review, deny the Board's Cross-Application for Enforcement, and conclude Citigroup did not violate the Act.

6. This Court Correctly Held That There Is No Inherent Conflict Between the NLRA and FAA Based On Collectively Bargained Provisions.

The *Murphy Oil* majority panel noted that it was "not persuaded by [this Court's] view that there is no inherent conflict between the NLRA and the FAA." The Board majority stated that "[t]hat the courts have understood the NLRA to permit *collectively bargained* arbitration provisions is irrelevant to the proper treatment of employer-imposed mandatory individual arbitration agreements." *Id.* at slip op. 10. To this end, the Board majority explained:

> [a]n individual arbitration agreement, imposed by employers on their employees as a condition of employment and restricting their rights under the NLRA, is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining between a freely chosen

[7] Section 10(a) is not a substantive right and "does not prohibit actions by employees, employers, or unions that may then in turn affect whether an unfair labor practice has been committed." *Id.* at slip op. 54. Clearly, as Member Johnson found in *Murphy Oil*, if Section 10(a) really did have the effect that the majority insists it does, agreements waiving rights, such as no-strike provisions, could not exist. *Id.*

> bargaining representative and an employer that has complied with the statutory duty to bargain in good faith.

Id.

However, the Board majority in *Murphy Oil* failed to account for the fact that, because collective bargaining is necessarily a give and take procedure, a union can ultimately agree to an arbitration protocol which guarantees represented employees fewer rights than what an employer might unilaterally implement in a non-unionized context. In *D.R. Horton*, this Court clearly illustrated this point, explaining that "courts repeatedly have understood the NLRA to permit and require arbitration, [and] [h]aving worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA." 737 F.3d at 361 *citing Blessing v. Freestone*, 520 U.S. 329, 343 (1997)("[W]e discern[] in the structure of the [NLRA] the very specific right of employees to complete the collective-bargaining process and agree to an arbitration clause.")(internal quotation marks and citation omitted).

As a result, because there are no legitimate grounds to distinguish between a unionized and non-unionized context in this realm, the Board majority's objection to this Court's finding in this regard is unavailing.[8]

[8] In addition, the *Murphy Oil* majority's contention that it was entitled to rely upon the NLGA is similarly misplaced. The NLGA provides that "yellow-dog" contracts are unenforceable in federal court and specifically defines such a contract as one in which an employee "promises not to join, become, or remain a member of any labor organization" or to forgo his employment if he does become a member of a labor organization. 29 U.S.C. § 103. Moreover, much like Section 7 of the NLRA, the NLGA also recognizes an employee's right to "be free to decline to associate with his fellows." 29 U.S.C. § 102.

B. Notwithstanding This Court's Explicit Findings, The Board Majority Erroneously Continued To Maintain That *D.R. Horton* and *Murphy Oil* Were Correctly Decided.

Although this Court explicitly found that *D.R. Horton* and *Murphy Oil* were incorrectly decided, the majority panel in the instant case nevertheless reaffirmed their erroneous holdings.

1. Mandatory Arbitration Agreements Precluding Employees From Bringing Group Workplace Claims Do Not Affect Any Substantive Rights Under the NLRA.

First, notwithstanding the extensive discussion *supra* as to why this Court correctly decided the issue, the *Murphy Oil* majority panel nevertheless explained that "[m]andatory arbitration agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict the exercise of the *substantive* right to act concertedly for mutual aid or protection that is central to the National Labor Relations Act." 361 NLRB No. 74, at slip op. 5. (Emphasis in original, internal citations omitted). The majority cited examples of cases in which

---

It is nonsensical to find that arbitration agreements containing collective/class action waivers—which according to the Supreme Court is a dispute resolution mechanism to be promoted, not discouraged—is an illegal agreement or, worse yet, a "yellow dog contract." The Board in *Murphy Oil* could not seriously be suggesting that the U.S. Supreme Court is promoting "yellow dog contracts" in its recent seminal decisions promoting arbitration and validating class/collective action waivers. As a federal court has held recently, the NLGA, "specifically defines those contracts to which it applies [i.e., yellow-dog contracts]. An agreement to arbitrate is not one of them." *Morvant v. P. F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. May 7, 2012) (citation omitted). For an in-depth discussion of why the majority's reasoning fails in this regard, *see* Member Johnson's dissent in *Murphy Oil* at slip op. 54-56.

the Board and courts have found that "litigation pursued concertedly by employees is protected by Section 7 has been upheld consistently by the Federal appellate courts…." *Id.* (internal citations and footnote omitted). While it may be true that such concerted litigation is protected by Section 7, the panel does not and cannot explain why an employer may not place restrictions on such litigation.

That the NLRA preserves an employee's "freedom of choice" in voluntarily deciding for himself or herself to participate or not in a class/collective action is explicitly recognized in *Salt River Valley Water Users' Assoc v. NLRB*, 206 F.2d 325 (9th Cir. 1953), a case heavily relied on by the Board in *D.R. Horton* and *Murphy Oil*. In *Salt River*, the Ninth Circuit held that employees have a Section 7 right to collect signatures on a petition authorizing the filing of a Fair Labor Standards Act collective action. In a part of the *Salt River* decision not cited by the Board, the Ninth Circuit reversed a Board finding of an unfair labor practice against the employer for allegedly coercing an employee to remove his name from the petition and thus to refrain from participating in the proposed collective action. It did so because the employee had removed his name voluntarily and without coercion, and did not perceive the employer's articulated displeasure with the petition as a "threat." In other words, the Ninth Circuit recognized that the employee had simply exercised his right to "refrain" from participating in the proposed collective action. *Salt River*, 206 F.2d at 329. As found in *Salt River*, a voluntary agreement to arbitrate only

individual claims, such as the arbitration agreement at issue here, is tantamount to an employee's exercise of his or her right to "refrain" from participating in class/collective action litigation and cannot, standing alone, give rise to an unfair labor practice.

The *Murphy Oil* majority panel also contended that the Supreme Court's decision in *Eastex v. NLRB*, 437 U.S. 556, 565-566 (1978) establishes that the right to engage in collective legal action in administrative and judicial forums is the core substantive right protected by the NLRA, and not merely a procedural right as this Court concluded in its *D.R. Horton* decision. *Id.* at slip op. at 5. However, the Supreme Court in *Eastex* recognized only that the circuit courts construing Section 7 have found that employees are protected from employer "retaliation" when pursuing such relief in "administrative and judicial forums," and left for a later day what constitutes "'concerted activities' in this context."[9] *Eastex*, 437 U.S. at 566, n. 15. Therefore *Eastex* does not support the Board majority's findings in *Murphy Oil*.[10]

---

[9] In fact, as discussed *supra*, had the Board opted to appeal this Court's decision in *D.R. Horton* to the Supreme Court, there was a possibility that it could have urged the High Court for clarification. Of course, for the reasons suspected *supra*, the Board did not do so.

[10] As Member Miscimarra explained in his *Murphy Oil* dissent,

> Conversely, the mere existence of a non-NLRA legal claim or complaint--or the involvement of two or more employees in some of the above activities--does not necessarily mean the employees are engaged in "concerted" activity, nor does it necessarily establish the "purpose" of "mutual aid or protection…."

Id. at slip op. 25. *See also* Member Johnson's dissent at slip op. 41-43.

2. Employer-Imposed Arbitration Agreements Do Not Restrict Section 7 Rights.

Next, the Board majority in *Murphy Oil* attempted to defend *D.R. Horton* by asserting that "[e]mployer-imposed individual agreements that purported to restrict employees' Section 7 rights, including agreements that require employees to pursue claims against their employer individually, violate the National Labor Relations Act, as the Board, the court of appeals, and the Supreme Court have held." *Id.* at slip op. 5 (internal citations omitted). However, none of the authority cited stands for the proposition that an employee may not waive the right to participate in a collective or class action. Instead, all of the Board majority's cases involved the enforceability of individual contracts that were intended either to impede union organizing or to be used as a weapon in collective bargaining. *See NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (Company entered into individual contracts in which the "employee not only waived his right to collective bargaining but his r[i]ght to strike or otherwise protest on the failure to obtain redress through ar[b]itration"); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944) (Company attempted to use individual contracts as a means to "impede employees" from organizing); and *National Licorice Co. v. NLRB*, 309 U.S. 350, 354, 361 (1940) (As a "means of thwarting the policy of the Act," the

Member Miscimarra echoed this conclusion in the present case. (ROA.219).

company threatened employees that, if they did not sign individual contracts requiring them to waive the right to strike, their jobs, among other things, would no longer be protected).

The courts found all of these contracts unenforceable because they encroached upon clearly defined rights in the workplace and evidenced the employer's transparent effort to circumvent those rules. Moreover, as the Supreme Court emphasized in *J.I. Case*, these cases do not stand for the proposition that an employer cannot contract "with individual employees under circumstances which negative *[sic]* any intent to interfere with employees' rights under the Act." 321 U.S. at 340-341. Indeed, the employer remains "free to enter into individual contracts" when the employer is "under no legal obligation to bargain collectively." *Id.* at 337. Therefore, the Board in the present case erroneously relied upon *Murphy Oil* for this reason as well.[11]

---

[11] As noted by Member Johnson in his dissent in *Murphy Oil*, the *Murphy Oil* majority incorrectly held that the employer violated the NLRA by filing a successful motion under the FAA. What is worse is that the Board majority ordered Murphy Oil to reimburse plaintiffs for their attorneys' fees in a case they *lost*. Member Miscimarra correctly illustrated the fundamental flaw in the Board majority's thinking: "The Board cannot impose a 'single, uniform, national rule" regarding these issues unless there is a parallel NLRB proceeding, pertaining to *every* case in which a 'class' waiver is enforced, so the Board can adjudicate and impose in these other cases the same remedies being formulated here." *Id.* at slip op. 29 (internal citations and footnotes omitted). The Board can only exercise jurisdiction if a charge is filed and only has jurisdiction over certain employers.

Accordingly, as Member Miscimarra poignantly explained in *Murphy Oil*, "even if there were parallel Board proceedings regarding *every* court case involving a disputed 'class' waiver agreement, the Board-ordered 'remedy,' if somehow imposed on the non-NLRA courts and agencies, would produce a patchwork where (i) some plaintiffs and defendants would have non-

IV. THE BOARD ERRED BY FAILING TO FIND THE UNFAIR LABOR PRACTICE CHARGE WAS NOT BARRED BY SECTION 10(B) OF THE ACT.

A. The Unfair Labor Practice Charge Was Untimely.

Citigroup's Eighth Affirmative Defense alleged:

> The Complaint is barred by reason of the statute of limitations in Section 10(b) of the National Labor Relations Act because, among other reasons, Charging Party filed her Charge more than six months after they accepted employment with Respondent and thereby voluntarily agreed to Respondent's arbitration agreement.

(ROA.10).

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and service of a copy thereof upon the person against whom such charge is made . . . ." 29 U.S.C. § 160(b). To the extent the Amended Complaint in this proceeding was premised on Citigroup's actions in causing Smith to be bound by Policy, those actions occurred more than six months before they filed

---

NLRA procedural issues dictated by the NLRB, and (ii) these same procedural issues for other plaintiffs and defendants--even *in the same case*--would be adjudicated by the non-NLRA court or agency." *Id.* at slip op. 29 (emphasis in original).

Therefore, contrary to the *Murphy Oil* majority's erroneous conclusion, "[n]othing in the Act suggests that Congress authorized the Board to engage in these types of haphazard, redundant and self-contradictory enforcement efforts regarding *non*-NLRA laws that, substantively and procedurally, are enforced by courts and agencies *other than* the NLRB." *Id* (emphasis in original, internal citations omitted). To the extent the Board adopted its earlier decision in *Murphy Oil* in this regard, it erred in doing so.

their charge. Therefore, the Board erred by failing to dismiss the Amended Complaint. (ROA.218).

To illustrate, Smith originally entered into the Policy with Citigroup when she commenced employment in February 2013. (ROA.57-64; 66; 68-73). Thus, the six month statute of limitations with respect to any challenges to the process by which Smith became bound to the Policy expired in August 2013. However, Smith did not file the present Unfair Labor Practice Charge until June 8, 2014, approximately 16 months after she entered into the Policy. (ROA.57-64; 66; 68-73). Therefore, Smith cannot claim in this proceeding that her Section 7 rights were violated when she became bound to Citigroup's Policy in February 2013. This means, very simply, that the Board is precluded from arguing that Smith did not enter into a valid and binding arbitration agreement with Citigroup when she signed the Policy in February 2013 and voluntarily elected to commence her employment knowing full well that she would be required to arbitrate any employment-related disputes on an individual, and not on a class-wide, basis. To put it another way, Smith cannot attack contract formation issues, including the voluntariness of the agreement, 16 months after the contract was formed. Thus, the Board erred by failing to hold that allegations pertaining to Smith's execution of the Policy in February 2013 are clearly time barred pursuant to Section 10(b) of Act. (ROA.159-160; 218).

B. The Board Erred By Concluding that the EAP Was A "Rule" That Was "Maintained" During the 10(b) Period.

The Board erred by concluding that Citigroup's Policy was a "rule" that was maintained during the 10(b) period, rather than a "contract" between the employee and Citigroup. The Board incorrectly held that the maintenance of the EAP explicitly infringes on the employees' Section 7 rights and violates the Act irrespective of when it was established or whether it has ever been enforced. However, by signing the EAP in February 2013, Smith clearly created a voluntary and binding *contract* in which she agreed to arbitrate any employment-related disputes that might arise during her employment. While it might make sense to say an employer "maintained" a policy or a rule, it does not make sense to say an employer "maintained" an agreement between an employer and employee to arbitrate disputes.[12] An agreement either exists or not, and it is either in effect or not – as determined by the terms of the contract. As such, the concept of "mere maintenance" of a rule that chills Section 7 rights should not apply to an arbitration agreement that is binding on both an employer and an employee from its inception.

[12] *See e.g. Tolbert v. Conn. Gen. Life Ins. Co.*, 257 Conn. 118, 126-127 (2001)(finding statute of limitations for breach of contract claim alleging bank procured inadequate mortgage disability insurance ran from when insurance policy was procured by bank, not when insurance benefits ceased for aggrieved party, "because … policy was either adequate or inadequate [when procured]."

The Board's recent decision in *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015), *enf'd. in relevant part*, 824 F.3d 772, 778-779 (8th Cir. 2016) is not to the contrary. The Board majority there mistakenly concluded the class action waiver in that case, promulgated more than six months prior to the charge being filed, was unlawful based upon a continuing violation theory. *Id.* at slip op. 2. To support this finding, the Board cited to several cases involving employer rules as well as *Teamsters Local 293 (Lipton Distributing)*, 311 NLRB 538, 539 (1993) with the following parenthetical: "finding violation for maintenance of unlawful contractual provision executed outside 10(b) period." *Id.* at n. 7. In *Teamsters Local 293*, the Board granted the General Counsel's motion for summary judgment, finding the *union* unlawfully entered into a collective bargaining agreement containing a clause requiring shop stewards to be paid a premium over other employees in contravention of Sections 8(b)(1)(A) and 8(b)(2). The charging party in *Teamsters Local 293* did not enter into the unlawful agreement with the employer; his union did. As a result, there were equitable grounds in *Teamsters Local 293* for the continuing violation theory to apply (i.e. to permit an aggrieved individual who was not a party to the initial contract to challenge the purported illegality). The same logic applies to "rules" cases because the employer unilaterally promulgates rules.

Unlike in *Teamsters Local 293* or the "rules" cases, Smith and Citigroup were the only parties to the EAP. Therefore, there is no equitable reason to conclude the

continuing violation should apply in the present case because Smith was a party to the EAP and thus was directly affected by its terms. In addition, the EAP was entered into *after* the Board's decision in *D.R. Horton* so there can be no claim that it was unclear at the time Smith and Citigroup entered into the EAP that the EAP would be construed as unlawful in the Board's (erroneous) view.

V. THE BOARD ERRED BY FINDING SMITH WAS ENGAGED IN "PROTECTED CONCERTED ACTIVITY."

A. The Standards for Determining Protected Concerted Activity.

Citigroup's Ninth Affirmative Defense alleged:

> The Complaint is barred because Charging Party acted alone and for her own benefit in filing her civil action, and by her conduct did not engage or seek to engage in protected, concerted activity under the National Labor Relations Act.

(ROA.10).

The basic principles defining "protected concerted activity" emerge from the Board's decisions in *Meyers Industries, Inc. and Prill*, 268 NLRB 493 (1984) (*"Meyers I"*), *remanded* 755 F.2d 941 (D.C. Cir. 1985) and *Meyers Industries, Inc. and Prill*, 281 NLRB 882 (1986) (*"Meyers II"*), *enf'd.* 835 F.2d 1481 (D.C. Cir. 1987) 835 F.2d 1481, *cert. denied*, 487 U.S. 1205 (1988). Thus, in *Meyers I*, the Board defined concerted activity under Section 7 of the Act as an activity that is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497. This definition was

refined in *Meyers II* to make clear that concerted activity occurs when "individual employees seek to initiate or to induce or to prepare for group action." *Meyers II*, 281 NLRB at 887. Importantly, in *Meyers I*, the Board overturned the doctrine of "constructive concerted activity," which had been articulated in the Board's earlier decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975). This doctrine allowed concerted activity to be established by a presumption that other employees supported an individual employee's complaint. Since the decisions in *Meyers I* and *Meyers II*, it has been clear that concerted activity cannot be presumed, and must be established by *evidence* of group activity, or an individual seeking to initiate or invoke group activity, or an individual raising a group, rather than an individual, complaint.

The application of these principles to class action litigation were carefully analyzed by then General Counsel Ronald Meisburg in Memorandum GC 10-06. While the Board in *D.R. Horton* rejected the "reasoning in GC Memo 10-06," it did not purport to overrule the well-established principles defining "protected concerted activity" set forth in *Meyers I* and *Meyers II*, nor did it purport to overrule *Meyers I's* rejection of the doctrine of "constructive concerted activity." As pointed out by the former General Counsel:

> . . . an individual's pursuing class action litigation for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures. Similarly, an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right. To conclude

> otherwise would be a return to the concept of "constructive concerted activity" that the Board rejected in *Meyers Industries (Meyers I)*, 268 NLRB 493, 495-96 (1984), remanded 755 F.2d 941, 957 (D.C. Cir. 1985), reaffirmed *Meyers Industries (Meyers II)*, 281 NLRB 882, n.11 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987) (overruling the holding in *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975) that a single employee's seeking to enforce statutory provisions "designed for the benefit of all employees" is concerted activity "in the absence of any evidence that fellow employees disavow such representation").

D.R. Horton notwithstanding, it is error to presume that because Smith joined a putative class action, she was engaged in *protected concerted activity* within the meaning of *Meyers I* and *Meyers II*, especially because there is no record evidence that this was the case.

Accordingly, the Board incorrectly affirmed the ALJ's incorrect holding that there was "simply no evidence in this case that Smith, Eschevarria [sic], and the other designated, similarly situated employees were acting on their own behalf." (ROA.159-160; 218).

B. <u>There Is No Evidence Smith Engaged in Protected Concerted Activity by Filing a Putative Class Action.</u>

As stated in *Meyers II*, "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." *Meyers II*, 281 NLRB at 886. Here, there is simply no evidence of concerted activity. Indeed, the mere fact that Smith participated in a demand for a putative class action arbitration, which if certified would result in a class of present and former

employees, does not result in a presumption of concerted activity. *See id.* at 887-889; *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980).

Two other factors suggest that Smith was not engaged in protected concerted activity when she submitted the demand for class-wide arbitration. In *Stationary Engineers Local 39*, 346 NLRB 336, 347 (2006) the Board affirmed an ALJ's decision which specifically found:

> Sec. 2(3) of the Act defines who are employees. It includes individuals who have lost their jobs due to a labor dispute or because of an unfair labor practice. It does not include former employees who are filing personal lawsuits against their former employer and who have lost their jobs for other reasons.

Id. at 347, n. 9.

Stationary Engineers applies with equal force to the present case. First, Smith was no longer an employee of Citigroup, having resigned the same day that the demand for arbitration was filed with the AAA.[13] Second, it is hard to see how Smith's action in joining a putative class action was for the purpose of "mutual aid or protection," given that she no longer had any stake in the working conditions of Citigroup's employees.

The ALJ's (and subsequently the Board's) attempt to avoid the forceful effect of *Statutory Engineers Local 39* is misplaced. First, there is no fundamental

[13] As a result, the instant case is distinguishable from *Murphy Oil*, 361 NLRB No. 72, at p. 3, in which the charging party filed a collective action in federal court *while still employed* by the respondent.

difference between an individual who voluntarily resigns (as Smith did) and one who loses a job for a reason unrelated to a labor dispute or unfair labor practice. The obvious common thread between these separations is that they *did not involve a labor dispute or unfair labor practice*. (ROA.159; 218). Second, the ALJ in the instant case held Smith "did not file a personal lawsuit." (ROA.159; 218). Certainly, it cannot be disputed that Smith initiated some form of litigation against Citigroup on her own behalf *and after her voluntary separation*. Finally, the Board and ALJ conflate the concepts of standing and concerted activity. Citigroup does not contest Smith's standing in the present case. Rather, Citigroup disputes that she was engaged in protected concerted activity *specifically because she voluntarily separated from employment and no longer shared the same interests as current employees*.

VI. THE PREEMPTIVE EFFECT OF THE FAA INVALIDATES THE REMEDIES ORDERED BY THE BOARD.

The Board's Order seeks broad remedies, including ordering Citigroup to cease and desist from maintaining or enforcing a mandatory arbitration agreement that requires employees to waive their right to pursue class or collective action claims in all forums. In addition, the Board's Order requires Citigroup to: (a) rescind the requirement that employees enter into the Policy as a condition of employment and expunge all such EAPs; (b) rescind or revise the Policy to clarify that it does not constitute a waiver of the right to pursue class/collective action claims in all forums; (c) notify employees of the revised Policy and provide them with a copy of the same;

and (d) post a Notice at its facilities where the EAP has been maintained or enforced. (ROA.220; 226-227).

As discussed above, the Supreme Court's recent decisions demonstrate that the FAA has a very broad preemptive effect, and that all state and federal laws and public policies interfering with the enforcement of arbitration agreements according to their terms must give way. Thus, in *Marmet,* the Supreme Court vacated a decision by the Supreme Court of Appeals of West Virginia which held that West Virginia's public policy against arbitration of personal injury or wrongful death claims against nursing homes was not preempted by the FAA. The Supreme Court stressed that West Virginia's policy was "a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Marmet,* 133 S. Ct. at 1204. In *Concepcion,* the Supreme Court found that a rule which stands as an "obstacle" to the accomplishment of Congress' objectives under the FAA cannot stand. *Concepcion,* 131 S. Ct. at 1753.

Here, the remedies clearly create obstacles to the enforcement of arbitration agreements according to their terms and, therefore, conflict with the FAA. The recommended relief would require Citigroup to stop enforcing its Policy which is completely contrary to the Supreme Court's mandate that arbitration agreements be enforced according to their terms.

Ultimately, the Board's remedial regimen in this case would undoubtedly discourage the use of arbitration, contrary to federal policy under the FAA. As such, the preemptive effect of the FAA invalidates these remedies.

VIII. CONCLUSION

The Board's decision finding that Citigroup has violated Section 8(a)(1) is meritless based on a myriad of reasons. It is premised on the Board's erroneous decisions in *Murphy Oil* and *D.R. Horton*, both of which have been explicitly rejected by this Court as well as numerous courts across the country and cannot be reconciled with the Supreme Court's decisions interpreting the FAA, including the High Court's most recent decision in *American Express.*

For all the reasons stated herein, and contrary to the Board's findings, conclusions, and order/remedies, Citigroup respectfully submits that this Court grant its Petition for Review and deny the Board's Cross-Application for Enforcement.

This 19th day of September, 2016.

Respectfully submitted,

By: */s/ Edward M. Cherof*
Edward M. Cherof (Lead attorney)
Georgia Bar No. 123390
cherofe@jacksonlewis.com
Jeffrey A. Schwartz
Georgia Bar No. 558465
jake.schwartz@jacksonlewis.com
Jonathan J. Spitz
Georgia Bar No. 672360
spitzj@jacksonlewis.com

Daniel D. Schudroff
New York Bar No. 4665345
JACKSON LEWIS P.C.
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, Georgia 30309
Telephone: (404) 525-8200
Facsimile: (404) 525-1173

ATTORNEYS FOR PETITIONERS / CROSS-RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I caused to be served a true and correct copy of Petitioners/Cross-Respondents' Brief via the Court's electronic case filing system which will automatically serve the following:

Linda Dreeben
Deputy Associate General Counsel
Valerie Collins
Elizabeth Heaney
M. Kathleen McKinney
National Labor Relations Board
Appellate Court Branch
1015 Half St., SE
Washington, DC 20570

I hereby certify that on September 19, 2016, I caused to be served a true and correct copy of Petitioners/Cross-Respondents' Brief via U.S. Mail with sufficient postage thereon to reach its destination upon the following:

Margaret J. Diaz
National Labor Relations Board
Regional Office
Suite 530
201 E. Kennedy Boulevard
S. Trust Plaza
Tampa, FL 33602-5824

Andrea Smith
(ADDRESS WITHHELD)

/s/ Edward M. Cherof
Attorney for Petitioners/Cross-Respondents
Georgia Bar No. 123390

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,762 words, as counted by the word processing system used to prepare it, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman font size 14.

/s/ Edward M. Cherof
Attorney for Petitioners/Cross-Respondents
Georgia Bar No. 123390